IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2007

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

WRIT PETITION Nos.1146 of 2001 and 5811 of 2004
and
W.P.M.P.Nos.6802 of 2004 and 16316 of 2006

1.Mrs.Ruth Ayyakutti
2.Dr.S.M.Augastine
3.Mrs.J.Adora Inbaraj

... Petitioners in both the writ petitions

Vs.

1.The Secretary to Government,
Housing & Urban Development
Department, Fort St.George,
Chennai-9.
2.The Director of Town and Country Planning,
807, Anna Salai,
Chennai - 2.
3.The Commissioner of Tirupur Municipality,
Tirupur.

.... Respondents in both the writ petitions

* * *

Writ Petitions filed under Article 226 of the Constitution of India praying to issue Writs of Certiorarified Mandamus as stated therein.

For petitioners in both the petitions : M/s.D.Peter Francis

For respondents in both the petitions : Mr.G.Sankaran Addl.G.P.for R3
Mr.C.Thirumaran - G.A. For R1 & R2

* * *

O R D E R

W.P.No.1146 of 2001:- The Writ Petition has been filed praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the proceedings of the first respondent in G.O.Ms. (Valayam) No. 267, dated 16.12.1998 and quash the same and

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consequently direct the respondents to remove the EE 40 feet Thitta Salai from the planning of the first respondent and to forbear them from interfering with the enjoyment of the property by the petitioners in any manner or in the alternative pay the compensation, as on 16.12.1998, for the Plot Nos.1,6,17 and 18 in resurvey Nos.107 and 108/2 in Thottipalayam Village within Tirupur Town Panchayat limits.

(Prayer amended as per order of Court dated 12.12.2001 in WPMP No. 36150/2001)

W.P.No.5811 of 2004: The writ petition has been filed praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the third respondent, made in K.V.No.F2/11469/03, dated 18.02.2004, quash the same and consequently direct the respondents to approve the plan submitted by the petitioners to the third respondent.

2. Since both the above mentioned writ petitions have arisen under the same facts and circumstances, a common order is passed.

3.Heard the learned counsel for the petitioners as well as for the respondents.

The brief facts of the case, as stated by the petitioners, are as follows:-

4. Originally, the writ petitioners had filed a writ petition in W.P.No.1146 of 2001, for a Writ of Mandamus to direct the respondents to pay the compensation for Plot Nos.1,6,17 and 18 in re-survey Nos.107 and 108/2 in Thottipalayam village, within the Tirupur Town panchayat limits, as per the prevailing market value for the extent of 12,200 Sq.Mts. Subsequently, by an order of this Court, dated 12.12.2001, made in W.P.M.P.No.36150 of 2001, the prayer was amended praying that this Court issue a Writ of Certiorarified Mandamus to call for the records relating to the proceedings of the first respondent in G.O.Ms. (Valayam) No. 267, dated 16.12.1998, and quash the same and to direct the respondents to remove the EE 40 feet Thittasalai, from the planning of the first respondent and to forbear them from interfering with the enjoyment of the property by the petitioners or in the alternative to pay compensation, as on 16.12.1998, for Plot Nos. 1,6,17 and 18 in resurvey Nos.107 and 108/2 in Thottipalayam village within Tirupur Town panchayat limits.

5.It has been submitted by the first petitioner that she is the owner of Plot No.6, while the second petitioner is the owner of Plot No.1 and the third petitioner is the owner of Plot Nos.17 and 18, which comprises of 3200 Sq.ft for Plot Nos. 1,6 and 17 and for the 18th plot, the extent is 2600 Sq.ft. The said plots were approved by the Municipal Office, Tirupur, on 20th April, 1939, as evident from the order passed by the then Commissioner of Tirupur municipality.

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The said property was purchased by Dr.S.M.Augustus in the year 1961 and it was in his possession thereafter. After partition, it fell to the share of the petitioners and they have been in enjoyment of the property, since then. While so, the third respondent municipality had demolished the compound wall covering the plots of the third petitioner which had resulted in the filing of a suit O.S.No.80 of 1977 on the file of the District Munsif Court, Tirupur, in which the third respondent was made as the defendant. The District Munsif Court, Tirupur, had granted mandatory injunction after finding that the demolition of the suit wall by the defendant municipality was unauthorised and illegal. The decision was based on the available evidence and it was on the merits of the case. It has been further stated that after the demolition of the wall, the third respondent municipality had formed a mud road over the plots 1,6,17 and 18, preventing the use of the plots by the petitioners. According to the petitioner, the path which was laid by the municipality is really unnecessary , as the area is covered on the northern side by a road going to Murugappalayam, on the east by Avinasi road and in between the plots 6 and 17, there is a lay out road connecting the other plots. Taking advantage of the absence of the petitioners, the third respondent municipality had formed the road without following the procedure for acquisition or by paying the due compensation.

6. The petitioner has further stated that the lay-out was approved by the municipality during the year 1939, and the scheme proposed by the Tirupur municipality was sanctioned by the Government, on 08.02.1971. By oversight, the plots belonging to the petitioners were shown to be EE proposed 40 feet road and even as on the date of the filing of the writ petition, the road had not been formed. However, the road is being used as the vehicles and people are passing through it. The Tirupur Local Planning Authority, in its resolution No.33, dated 15.02.1995, had recommended for the deletion of the said road and the Member Secretary, Tirupur Local Planning Authority, had also recommended the same. However, the Director of Town and Country Planning, the second respondent herein, had rejected the request of the petitioners for deletion of EE 40 feet road, by his letter dated 02.05.1995. The petitioners had appealed to the Government by their representation, dated 29.03.1996. The Government by its order, dated 16.12.1998, made in G.O.Ms.No.267, rejected the request of the petitioners. This shows the clear intention of the respondents to use Plot Nos. 1,6,17 and 18 as a road without changing the original plan in which the said plots have been mistakenly classified as EE 40 feet road. According to the petitioner, the only remedy available to the respondents is to acquire the land under the Land Acquisition Act or to purchase the land from the petitioners. Merely by rejecting the request of the petitioners , the respondent cannot acquire the property and form the road, causing prejudice to the petitioners, without paying compensation to them.

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7.It has been further stated that in view of the judgment of the Civil Court in O.S.No.80 of 1977 and in view of the approved plan given by the third respondent, on 20.04.1939, P.Dis.No.395/1939, the plots are approved plots in Thottipalayam village and the ownership of the property cannot be doubted. Without initiating acquisition proceedings, the property belonging to the petitioners cannot be taken away by the respondents. Such an act would be contrary to Article 300-A of the Constitution of India. Further, the property can be taken away only in accordance with the procedure established by law and by paying adequate compensation, as provided by the law relating to acquisition of land.

8.The petitioners had also filed a writ petition in W.P.No.5811 of 2004 praying for a Writ of Certiorarified Mandamus to quash the order of the third respondent made in K.V.No./F2/11469/03, dated 18.02.2004. It had been stated that since the third respondent had demolished the compound wall in the petitioners' property, they had to approach the District Munsif Court, Tirupur, for a declaration and mandatory injunction. The said suit had been decreed in favour of the petitioners, on 12.07.1978. When the respondents had included the petitioners' property, as Thitta Salai, for the purpose of construction of a road, the petitioners had raised objections before the third respondent municipality as well as before the planning authorities, by sending representations for the deletion of the EE 40 feet road, which runs through the petitioners property. The Government of Tamil Nadu (Housing Urban Development Department) declined the request made by the petitioners and had refused to reconstruct the wall and to delete the road from the proposed Thitta Salai. It had, accordingly, dismissed the representation of the petitioners by a communication, dated 16.12.1998. Therefore, the petitioners had come before this Court by way of a writ petition in W.P.No.1146 of 2001, praying for a Writ of Certiorarified Mandamus to quash the order, dated 16.12.1998, passed by the first respondent and to consequently, direct the respondents to remove EE 40 feet road, Thitta Salai, from the plan of the first respondent and to forbear the respondents from in any way interfering with the peaceful possession and enjoyment of the property by the petitioners or in the alternative to pay compensation to the petitioners for the property, as on 16.12.1998. The writ petition had been allowed with the observation that it was open to the respondents to take lawful action, either to acquire the lands or to extinguish the petitioners' title or possession, in a manner known to law. Based on the Judgment in W.P.No.1146 of 2001 and in view of the undertaking given by the third respondent the petitioners had taken steps, in the month of February,2003, to construct the compound wall to safeguard the property, as there was an alternative road for the use of the general public. There were objections from the respondents, ward members and owners of the adjacent properties, with regard to the construction of the compound wall and therefore, the petitioners had stopped the

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construction of the compound wall, as the respondents were expected to take active steps to acquire the petitioners' property, within a short span of time. Since the respondents had not taken any effective steps to acquire the petitioners' property they were forced to send a notice to the respondents, on 05.02.2003. Since three was no reply to the notice sent by the petitioners, they had submitted a plan to the third respondent relating to the proposed constructions on their property. However, the proposal was rejected for the reason that there was a case pending before this Court relating to the petitioners' property and that the property belonged to the third respondent. Therefore, the petitioners were constrained to file the said writ petition before this Court praying for the issuance of the Writ of Certiorarified Mandamus as prayed therein. The petitioners had further stated that the order passed by the first respondent is clearly without jurisdiction and contrary to the decision rendered by this Court. The third respondent is duty bound to act in accordance with the undertaking given before this Court and any violation of the undertaking would amount to an act of contempt. It would be wrong on the part of the third respondent to claim that the property in question belonged to the third respondent municipality, in view of the decision of this Court made in W.P.No.1146 of 2001. The respondents had not taken any steps as promised, to acquire the property or extinguish the title or possession of the petitioners over the property. It was further stated that it would be appropriate for this Court to direct the respondents to sanction the proposed plan for construction, submitted by the petitioners, and to further grant an order of injunction to restrain the respondents from interfering with the peaceful possession and enjoyment of the property by the petitioners. It has also been stated that a Review Application had been filed in W.P.No.1146 of 2001. The Review Application No.7 of 2006 had been allowed by an order of the Division Bench, dated 30.1.2006.

9.The learned counsel for the petitioner had also raised additional grounds by way of W.P.M.P.No.16316 of 2006 in W.P.No.1146 of 2001, which has been allowed by this Court by its order, dated 10.11.2006. The writ petitioners have, inter alia, stated that the third respondent municipality had produced the Town Planning Scheme No.5 issued in G.O.No.312, Rural Development and Local Administration Department, dated 08.02.1971, only at the stage of the Review Application before the Division Bench. From the scheme, it is evident that EE Thitta Salai passes through S.Nos.450/1, 446/2C, 447, 446/1 and 443/3. However, EE Thitta Salai does not pass through S.Nos.443/2 and 445/1 which belong to the land of the petitioners and over which the road has to be formed. Hence, the impugned order as well as the refusal to delete the road in the property of the petitioners is liable to be quashed and the petitioners ought to be granted the planning permission as claimed in W.P.No.5811 of 2004.

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10.It was further stated that the municipality, with an ulterior purpose, had wantonly suppressed, the Town Planning Scheme No.5 and did not produce the same, either in the suit or in the writ petition, at an earlier stage. In fact, the learned District Munsif, in O.S.No.80 of 1977, drew adverse inference against the third respondent municipality, since the third respondent had not produced the scheme during the pendency of the proceedings. Further, the petitioner had stated that no notice was given by the third respondent municipality, about the formation of the road, as per the Town Planning Scheme. Hence, the third respondent municipality has trespassed on the properties of the petitioners and had formed a road illegally and in an unauthorised manner, contrary to the requests made by the petitioners . Even though, the learned District Munsif, Tirupur, had decreed the suit O.S.No.80 of 1977, in favour of the third petitioner, on 12.07.1978, the third respondent municipality, who was the defendant in the said suit, had not filed any appeal thereon. Therefore, the said judgment and decree passed in O.S.No.80 of 1977 had become final and conclusive.

11.It has also been stated that the Town Planning Scheme -5 in G.O.Ms.No.312, Rural Development and Local Administration Department, dated 08.02.1971, had been issued under the provisions of the Tamil Nadu Town Planning Act,1920, and not under the present Act. Further, if the third respondent municipality had felt that a road had to be formed through the properties of the petitioners, then it should have acquired the properties by virtue of Section 33 of the Act and no acquisition can be done after a period of three years from the date of the notification and it shall cease to have the effect of declaration, under Section 6 of the Land Acquisition Act,1894, vide Sections 33,34 and 35 of Act 7 of 1920.

12.The main submissions of the petitioners are that S.No.445/1 and 443/2 were not included in the notification under Section 14(3) of the Tamil Nadu Town Planning Act,1920, by means of G.O.Ms.No.312, dated 08.02.1971. As there is no inclusion of the above said portions in the EE 40 feet road, no road can be formed over the properties in Plot Nos. 1,6,17 and 18. The title to the properties have been established in a suit between the petitioners and the municipality in O.S.No.80 of 1977, dated 12.07.1978. Since the third respondent municipality had not preferred an appeal against the said decree, it has become final. Even if the municipality wants to form roads over Plot Nos. 1,6,17 and 18, it could be done by divesting the title of the properties, either by way of acquisition of the said properties or by private negotiations. Further, the notification issued by the first respondent in G.O.Ms.No.312, dated 08.02.1971, is conclusive with regard to what has been shown to be forming a part of the scheme. The said notification cannot be deleted or altered by the submission of plans and other materials. As per Section 14(6), a notification issued under Section 14(3) of the Tamil Nadu Town

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Planning Act,1920, and published in the Official Gazette shall be conclusive evidence that the scheme has been duly made and sanctioned. Admittedly, S.Nos.445/1 and 443/2 are not included in the EE Scheme road in Schedule – III. EE Thitta Salai is comprised in Survey Nos.450/1,446/2C,447,446/1 and 443/3. The contentions of the third respondent municipality does not show the correct position of the road in relation to the properties of the petitioners.

13.It has been further stated that once the findings in a Civil Suit O.S.No.80 of 1977 had become final, it would not be open to the respondents to raise a new plea at this stage. Further, the suit wall was constructed by the plaintiffs brother in the year 1964 and it was in the Northern Side of Plot No. 17. The submissions made by the third respondent municipality with regard to the application of provisions of Tamil Nadu Land Encroachment Act, will not apply to the present case. Further, as per the Tamil Nadu Survey and Boundaries Act, 1923, notices must have been issued to all the persons concerned calling for objections, before any action could have been taken. Therefore, any such action done contrary to the provisions of the act would be a nullity and it would not have any legal consequence.

14.The learned counsel for the petitioners had relied on the following decisions to support his contentions:-

14.1. In Raju S.Jethmalani and others Vs. State of Maharashtra and others, reported in 2005 (11) Supreme Court Cases 222, the Supreme Court had held that a citizen cannot be deprived of his rights without following the appropriate procedure established by law.

14.2.This Court, in its decision rendered in Muthu Gounder Vs. Poosari @ Palaniappan and 4 others, reported in 1998(I)CTC 477, has held that if sufficient proof is there on the side of the plaintiff with regard to his title, apart from considering the evidence leading to injunction, it is open to the court to go into the question of title, incidentally.

15.In the counter affidavit filed on behalf of the third respondent, it has been stated that both the writ petitions filed on behalf of the petitioners are not maintainable, both in law and on facts. It has been submitted that as per the old survey records and as per the re-survey held in the year, 1933, S.F.No.107/2, Thottipalayam village, has been changed into T.S.No.445/1, 445/2, Block No.11. As per old Survey records in T.S.No.445/1, 5.2 acres belonged to one R.Kumarasamy Chettiar and N.Mathiya Chettiar and 1.52 acres in T.S.No.445/2 belonged to R.Muthusamy Gounder, A.Palanisamy Gounder, M.Subbaraya Gounder and T.M.Sivasubramaniya Chettiar. Old Survey No.108/2, Thottipalayam village has been changed into old T.S.No.443/1, 443/2 and 443/3 Ward No.1, Block No.11.

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16.It has been further stated that the land relating to which the building permission was sought for by the petitioners originally falls in old T.S.No.443/2 Ward 1 Block No.11. During the re-survey which this old T.S.No.443/2 has been changed into New Town Survey No.55, Ward No.'K', Block No.23, registered in the name of the Commissioner, Tirupur municipality, as 40 feet road. As per new survey records and the register prevailing now, there is no Survey No.107/2, as stated by the petitioner.

17.It has been further submitted that as per G.O.Ms.No. 2182, C.T.& R.E. Department, dated 04.08.1971, under Section 5 of Tamil Nadu Survey and Boundaries Act,1923, Tirupur Municipal Town areas were ordered to be re-surveyed and it was completed in the year, 1977, in accordance with Section 13 of Land and Boundaries Act. This was notified in Coimbatore District Gazette, dated 27.01.1990.

18.It has been further submitted that as per the survey made the land in question was re-surveyed and renumbered as New Town Survey No.55, New ward 'K' and Block No.23, in the name of the Commissioner, Tirupur Municipality , 40 feet road. As per Section 9(2) of the Land and Boundaries Act, the affected parties should have filed an appeal to the Assistant Director of survey and land records, Coimbatore. Further, they could have approached the Civil Court against the proceedings of the Assistant Director survey and land records seeking their remedies. As per the Land and Survey record, the site in question is part of a Municipal road and therefore, building permission could not be granted. It has been further stated that the suit in O.S.No.80 of 1977, had been filed only for seeking a mandatory injunction with regard to the removal of a compound wall in the suit property and it can never be taken to be a declaration of title of the petitioners. Further, as per the sanctioned, Town Planning Scheme No.5, Part No.1, in G.O.Ms.No.312, dated 8.2.1971, Housing and Rural Development, the land in question was marked as EE 40 feet Scheme Road. As per the said scheme, the road was to be formed by the land owners. The request for deletion of EE 40 feet road, made by the petitioners, has been refused by the Government of Tamil Nadu, vide G.O.Ms.No.267, Housing and Urban Development, dated 16.12.1998, stating that a deletion of part of EE 40 feet road from the scheme will lead to disconnection of Murugapalayam and Indira Nagar main roads. As per the Government approved Town Planning Scheme, the land in question was a scheme road which was being used by the public for the past 23 years and that the land in T.S.No.55, Ward No.K, Block No.23, is registered in the name of the Commissioner, Tirupur Municipality, as per the survey records. The question of acquisition of the land or payment of compensation for the same cannot be considered since the property belongs to the Tirupur municipality. It has been further submitted that there are other lands which belongs to the petitioner Ruth Ayyakutti in

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T.S.No.57,58 and 61 in the same ward 'K' Block No.23. The petitioners have not filed any objections against the title in T.S.No.55, which was changed into a municipal road. As per the survey records now in existence, the combined patta No.138 has been changed into patta No.468, the Commissioner, Tirupur Municipality. Therefore, the petitioners' prayer cannot be granted.

19.In the reply affidavit filed by the first petitioner, the petitioners stand has been reiterated stating that the title in favour of the petitioners in the land in question has been found in O.S.No.80 of 1977, wherein it has been stated as follows :-

> " It is clear from Ex.A-1 that the plaintiff alone is the owner of the plots 6 to 20 comprised in T.S.No.443/2 and T.S.No.445/1 in Tirupur Town. Hence the title has already been found in favour of the petitioners".

20.It has been further stated that the land in question was approved, on 20.04.1939, with all roads and lanes having been handed over on 17.04.1939, and the entire area is well served with the existing roads. There is no necessity for laying a road in Plot Nos. 1,6,17 and 18. Infact, Tirupur Local Town Planning Authorities have recommended, by a letter, dated 09.03.1995, the deletion of the land from EE 40 feet road. Therefore, the decision of the first respondent, to refuse the request of the petitioners, was arbitrary and illegal.

21.The learned counsel for the petitioners had further contended that the Revised Plan submitted before this Court, by the third respondent municipality, is not the original. Further, it is seen from the sketch that the survey number shown by the third respondent to be forming the scheme road are stray survey numbers and therefore, they cannot be said to be forming a contiguous road, especially, when survey number 445/1 and 443/2 are not there in the scheme marked EE Road. The scheme as originally published, in accordance with the provisions of the Madras Town planning Act, 1920, shall be final and conclusive. Even if a ratification had been made, as per the provisions of the Act, the lands in question shall be acquired within a period of three years.

22.The learned counsel appearing for the third respondent municipality had referred to the various provisions of the Madras Town Planning Act,1920, to show that all the relevant provisions have been followed by the authorities concerned while formulating the scheme. After 1932, R.S.No.107/2 had changed as 445/1 and 445/2, R.S.No.108/2 had changed to 443/1,443/2, and 443/3. Further, re-survey had been commenced in the year 1971, under the provisions of the Tamil Nadu Survey and Boundaries Act and it was completed, on 27.12.1989. Thereafter, Survey Nos.443/2 and 443/3 were included in

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Town Survey No.55, under schedule III of the scheme. The scheme had been mooted out in the year 1939. In a notification published under Section 12 of the Madras Town Planning Act,1920, the scheme was published, on 05.05.1942, and the publication under Section 14(3) was made, on 08.02.1971, by way of G.O.Ms.No.312, Rural Development and Local Administration Department.

23.It has been contended by the learned counsel appearing for the third respondent that the only remedy open to the petitioners is by way of establishing their title, with regard to the property in question, before the Civil Court and the decree which had been obtained by the petitioners, in O.S.No.80 of 1977, does not declare the title of the petitioners and it does not amount to an executable decrEE Further, it is barred by limitation for being beyond the period of 12 years.

24. On a careful perusal of the records available and based on the rival contentions raised on behalf of the parties concerned, this Court is of the considered view that the petitioners have not shown sufficient cause for this Court to hold that the lands in question belong to the petitioners. On the contrary, the third respondent municipality has been in a position to show that the lands are in survey numbers forming a part of the EE 40 feet Scheme Road. The judgment rendered in O.S.No.80 of 1977 cannot, per se, be taken to be declaring the title of the petitioners in the lands in issue. The petitioners cannot question the Town Planning Scheme, at this stage, stating that due notice was not given by the third respondent municipality about the formation of the road as per the scheme, especially, in view of the fact that the petitioners had not challenged it at the earliest point of time, in a manner known to law. It was always open to the petitioners to declare their title over the properties in question by way of initiating appropriate civil proceedings before a court of competent jurisdiction. However, they have not chosen to do so. It was only the third petitioner, namely, J.Adora Inbaraj, who had filed a suit in O.S.No.80 of 1977, on the file of the District Munsif, Tirupur, against the third respondent municipality for a mandatory injunction to direct the municipality, which was the defendant therein, to reconstruct the compound wall which is said to have formed on the northern boundary of the suit property.

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25.In such circumstances, the petitioners cannot be justified in claiming the reliefs prayed for. Therefore, the writ petitions are dismissed. Consequently, the connected W.P.M.Ps are closed. No costs.

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Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Secretary to Government,
   Housing & Urban Development
   Department, Fort St.George,
   Chennai-9.

2. The Director of Town and Country Planning,
   807, Anna Salai,
   Chennai - 2.

3. The Commissioner of Tirupur Municipality,
   Tirupur.

1 CC TO MR.D. PETER FRANCIS, ADVOCATE SR NO 5141

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and
W.P.M.P.Nos.6802 of 2004 and 16316 of 2006

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